**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

| | | |
|---|---|---|
| **WILLIAM ROBERT BILL,** | : | |
| | : | |
| **Plaintiff,** | : | |
| | : | |
| **v.** | : | **Civil Action No. 05-154E** |
| | : | **Judge Sean J. McLaughlin** |
| **TROOPER VICTOR J. STERNBY,** | : | |
| | : | |
| **Defendant.** | : | |

# BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

## STATEMENT OF THE CASE

### A. Nature of Action and Relevant Procedural History

This case arises from a drunk driving arrest in the early morning hours of February 22, 2003, after defendant Trooper Sternby and his partner found Plaintiff, William R. Bill, and his passenger asleep in a truck that was stuck in a snow bank. (Complaint, ¶¶ 11, 12.) During the course of the officers' investigation for possible DUI violations, Bill fell to the pavement and struck his head. (Id., ¶ 16.) Bill alleges that this accident "was predictable and the product of the deliberate indifference of the defendants" to his safety. (Id., ¶ 24.)

Bill initially filed the instant complaint in the Court of Common Pleas of Philadelphia County alleging claims under 42 U.S.C. §1983 and the Pennsylvania Constitution against the Pennsylvania State Police ("PSP") and two individuals, Trooper Victor Sternby and Colonel Jeffrey Miller. Defendants removed the case to the United States District Court for the Eastern District of Pennsylvania and then filed a Motion to Transfer Venue to the Western District of Pennsylvania. That Motion was granted on March 21, 2005.

By Order dated August 24, 2005, this Court granted defendants' Motion to Dismiss in part, dismissing the Pennsylvania State Police and Commissioner Jeffrey Miller. This Court also dismissed Bill's Fourth and Eighth Amendment claims in Counts I and II, as well as all of the state law claims. The only remaining claim against Trooper Sternby is one under the Fourteenth Amendment-based "state created danger" theory.

### B. Undisputed Facts

The undisputed material facts are set forth in a separate statement filed simultaneously with defendant's Motion for Summary Judgment and supporting brief in accordance with Local Rule 56.1.

## ARGUMENT

### I. Sternby is Entitled to Judgment as a Matter of Law on Plaintiff's Claim For a Violation of Substantive Due Process Under the State-Created Danger Theory.

The essence of Bill's claim is that Defendant Sternby acted with deliberate indifference when he required Bill, who was highly intoxicated, to undergo field sobriety tests and stand alone at the front of the patrol car while Sternby retrieved a preliminary breath testing machine from the back seat. Bill's claim is predicated upon the state-created danger theory under the substantive due process component of the Fourteenth Amendment. This theory permits recovery in extremely limited circumstances, when state action affirmatively creates a dangerous condition which causes injury to a protected individual. Bright v. Westmoreland Co., et al, 443 F.3d 276, 281 (3d Cir. 2006); Morse v. Lower Merion School District, 132 F.3d 902, 907 (3d Cir. 1997).

Under the state-created danger theory, a plaintiff can establish a violation of substantive due process rights by demonstrating (1) the harm ultimately caused by the state actor was foreseeable and fairly direct; (2) the state actor acted in willful disregard for the safety of the plaintiff, *i.e.*, with a degree of culpability that shocks the conscience; (3) there existed some relationship between the state and the plaintiff such that the plaintiff was a foreseeable victim; and (4) the state actor affirmatively used his authority to create an opportunity that otherwise would not have existed for the harm to occur. Bright, 443 F.3d at 281; *see also* Smith v. Marasco (Marasco II), 430 F.3d 140, 152 (3d Cir. 2005), citing Mark v. Borough of Hatboro, 51, F.3d 1137, 1152 (3d Cir. 1995); Smith v. Marasco (Marasco I), 318 F.3d 497, 506-507 (3d Cir. 2003).

In the instant case, the record does not support a finding of willful disregard (element #2) or that Sternby created the opportunity for the harm (element #4). Likewise, this record does not support element #1, that the harm was foreseeable and fairly direct.

**A. The Record Does not Establish Deliberate Indifference**

With respect to the element of willful disregard, liability will attach "only to conduct that 'shocks the conscience.'" Marasco I, 318 F.3d at 506-07, citing County of Sacramento v. Lewis, 523 U.S. 833, 845 (1998). According to the Third Circuit, "conscience-shocking" conduct necessitates a showing of "purpose to cause harm" in the context of true split-second official decisions, while a showing of deliberate indifference may suffice in "the custodial situation of a prison, where forethought about an inmate's welfare is possible." Marasco I, 318 F.3d at 508-509, citing Miller v. City of Philadelphia, 174 F.3d 368, 375-76 (3d Cir. 1999). For those cases falling in between split-second decision making and relaxed deliberation, an official's conduct must exhibit a "level of gross negligence or arbitrariness" in order to establish "conscious-shocking" under the state-created danger theory. Marasco I, 318 F.3d at 508-509.

While the instant case is not necessarily a "split-second decision" matter requiring proof of purposeful or intentional conduct by Sternby, it also is not a case in which officers "had the luxury of proceeding in a deliberate fashion, as prison medical officials can." Marasco I, 318 F.3d at 509 (citing Miller, 174 F.3d at 375)). Rather, the appropriate level of wrongdoing required for willful misconduct in this case should be the midlevel standard – whether the officer's conduct must exhibit a level of "gross negligence or arbitrariness" that shocks the conscience. Marasco I, 318 F.3d at 508-509.

Defendant Sternby respectfully submits that no reasonable fact finder could equate his conduct vis-à-vis Bill on February 22, 2003 with gross negligence or arbitrariness so as to shock the conscience. Bill himself does not recall anything about what happened that morning. (Exh. 4 - Bill Depo. Tr. at 58.) However, the patrol car video (Exh. 3), which Sternby identified as the video of Bill's arrest on February 22, 2003 (Exh. 1 – Sternby Depo. Tr. at. 63-65), reflects the pertinent events relating to Bill's DUI arrest, starting at approximately 6:23 am and ending nearly ten minutes later when he fell.

**1. Sternby's Initial Contact with Bill**

As reflected in the video (Exh. 3) and in Sternby's report of the arrest (Exh. 2), although Sternby and his partner arrived at the scene and activated the video camera attached to the patrol vehicle at approximately 6:23:09 a.m., Bill did not fall until nearly ten minutes later, at 6:32:49 a.m. During those ten minutes, Sternby had the opportunity to observe Bill closely as he was awakened, as he exited the car and put his coat on, as he found his license and registration documents, as he answered questions such as when he got there and how long he had been there, and as he attempted to perform field sobriety tests. (Exh. 1 pp. 39, 65-67; see also Exh. 3.) The video plainly reflects that Bill stood without apparent difficulty during this time, with his hands in his coat pockets. This was in stark comparison to his passenger, who had difficulty standing and walking as soon as he exited the vehicle. (Exh. 3.)

Several minutes later, at 6:25:48, Sternby walked away from Bill and went back to the patrol car to reposition the camera toward the road for field sobriety tests (FST's). (Exh. 3; Exh. 1, p. 68.) For the next four four minutes, everyone is next to the truck and out of camera view. (Exh. 1, pp. 68-69.) The officers were talking with Bill and his passenger, going over their license and registration information.[1] (Id.) During these four minutes off camera, Bill did not leave the truck area. (Exh. 1, p. 69.) Moreover, there is nothing in the record which suggests Bill had problems standing during this period, or that Bill had difficulties when Sternby left him to reposition the camera. To the contrary, the first instance of Bill falling or stumbling was the only instance, when he appeared to pass out at the front of the patrol car. (Exh. 1, p. 37.)

**2. Sternby Administers Field Sobriety Tests**

At 6:30:25, Sternby moves with Bill to the road, into full camera view, to start field sobriety tests. (Exh. 1, pp. 69-70; Exh. 3.) Bill refused to try the one-leg stand. (Exh. 1, pp. 39, 70-71; Exh. 2; Exh. 3.) Sternby then demonstrated the walk and turn test, but Bill could not follow Sternby's instructions. (Exh. 1, p. 39, 71-72; Exh. 2; Exh. 3.) The FST's with Bill last a little over two minutes, until 6:32:40. (Exh. 3.)

**3. Bill's Fall at the Front of the Patrol Car**

At 6:32:40, Sternby starts to escort Bill back to the front of the patrol car, walking slightly to the side and front of Bill, without holding or supporting him. (Exh. 1, pp. 41-42, 73-74; Exh. 3.) Sternby planned on having Bill wait at the front of the car, in view of the camera and away from possible traffic hazards, while he went to the back seat to retrieve the preliminary breath testing machine (PBT). (Exh. 1, pp. 42-43.) Seconds later, as Bill reaches the front of the car and Sternby starts to turn away, Bill just falls over, without making any overt attempt to catch himself. (Exh. 1, pp. 47, 73-74.)

---

[1] Joyce was insisting that he was the driver and owner of the truck and that the registration in Bill's name was a misprint or typographical error. (Exh. 1, pp. 68-69.)

Far from suggesting arbitrariness that shocks the conscience, this record plainly reflects Sternby's attentiveness to Bill's safety and rights throughout the arrest process. Sternby does not force Bill to take steps or make dangerous moves; he remains close to Bill at all times; Sternby places Bill at the front of the patrol car because he considered it an area of safety and so that Bill can remain in camera view; Sternby does not attempt to control or influence Bill's movements. (Exh. 1, pp. 41-42, 55; Exh. 3.) In addition, Sternby was sensitive to the fact that Bill had been wakened from sleep, and believed it was important to perform all available tests before placing Bill under arrest for DUI. For example, although Sternby was "fairly certain" that Bill was too intoxicated to drive safely by the time he got to the third FST (the horizontal gaze nystagmus test), which was the point at which Bill fell in front of the patrol car, Sternby had not reached that conclusion **before** even starting the field sobriety tests. When asked whether Sternby was pretty certain Bill was too intoxicated to drive safely even before starting the FST's, Sternby replied:

> I don't know if that would be a fair statement. For one, I have had instances where I have found people sleeping behind a vehicle that had been drinking and when you first awake them, they are disoriented and confused and after you have had them up for five minutes or so, they get their wits about themselves and become perfectly capable of doing things beyond that which has resulted in them not getting arrested.
>
> The other thing is with the way I do the test I don't generally form an opinion until I have completed all the tests because if I have already formulated my opinion there is no point in continuing on with the test further.

(Exh. 1, pp. 40-41.)

The foregoing record stands in sharp contrast to the facts in Smith v. Marasco, supra, where the Court of Appeals did find a disputed question of fact as to whether the defendant police officers acted with deliberate indifference. Marasco I, 318 F.3d at 508. In that case, the plaintiff was a former police officer and Vietnam veteran who suffered from medical problems, including coronary heart disease and post-traumatic stress disorder. Certain members of the state police had dealt with Smith on prior occasions in light of ongoing problems between Smith and his neighbor; the police had even charged Smith with making false reports and harassment. Several troopers conceded that they were aware of Smith's condition and that he experienced flashbacks. Marasco I, 318 F.3d at 502.

Officers went to Smith's house at 10:30 pm on July 10, 1999 to investigate a complaint by Smith's neighbor. No one answered Smith's door or telephone. While searching the back of the house, officer Marasco saw a small red light on another officer's body, causing him to believe that Smith was directing a laser-sighted firearm at the officers. They called for back-up, unsuccessfully used a public address system to communicate with Smith, and then requested activation of the Special Emergency Response Team ("SERT"), considering the scenario to be a "barricaded gunman" situation. Marasco I, 318 F.3d at 502 -503. At some point, officers saw an individual believed to be Smith walk away from the house to a shed in the backyard, although he did not respond and could not be identified. Marasco I, 318 F.3d at 503.

Soon, there were at least 30 SERT members surrounding Smith's house, with riot gear and camouflage, sharpshooters were positioned and a helicopter was hovering overhead. SERT rejected offers from family and friends to communicate with Smith, chose not to send a message from anyone close to Smith and rejected use of a psychologist. Marasco I, 318 F.3d at 503. Eventually, they entered the house and backyard shed with rocks, tear gas and distraction devices but did not find anyone, only Smith's identification, false teeth and heart medication for his recent triple bypass surgery. Officers found weapons in the house, but none had a laser sight. They then searched the wooded area adjacent to the house but did not locate Smith. They called off the search and left around noon the following day. Marasco I, 318 F.3d at 503-04. There is disputed testimony concerning the scope and seriousness of subsequent search efforts by the police in the woods over the next several days. Id.

Smith's decomposed body was not found until a week later, only 200 yards from his home. Marasco I, 318 F.3d at 504-505. The forensic pathologist concluded that Smith died sometime on July 11th and that the stress of the incident probably led to a fatal heart attack. Id. He also stated that a person should have been able to notice the smell and buzz of flies within one day from a distance of 10 to 20 yards from the body. Id.

Faced with this record, the Third Circuit held that fact issues precluded summary judgment on the state created danger claim, particularly as to the second element – conscience-shocking conduct. Marasco I, 318 F.3d at 508. According to the Court, the above evidence, coupled with expert opinions that the officers' conduct fell significantly below accepted professional standards for dealing with emotionally disturbed persons, was sufficient to allow a reasonable jury to conclude that the officers' conduct with respect to the activation of SERT and the subsequent woods search shocked the conscience. Marasco I, 318 F.3d at 509.

By contrast, in this case, Sternby and his partner were responding to a routine call, where they found Bill and his passenger asleep in a truck in the snowbank. There is no allegation that Bill had any unique medical problems or that Sternby had any special knowledge about Bill or his condition. Sternby did not automatically assume that Bill was highly intoxicated and arrest him, but proceeded with FST's and a PBT, recognizing that people wakened from a deep sleep can be disoriented and confused. There is no evidence that Sternby had ever been in a similar situation, where an extremely intoxicated individual passed out in the course of field sobriety tests. On the contrary, Sternby testified that he had participated in over 200 DUI arrests during the course of his 15-year career as a trooper, yet never had an experience where someone (even with a higher blood alchohol level) simply passed out or fell over without attempting to catch or stop himself. (Exh. 1, pp. 8, 21-22, 54.)

Moreover, Bill had not given Sternby any reason to suspect that he was going to fall. According to Sternby, Bill may have been unsure of his footing at times, but it was nothing extraordinary. (Exh. 1, pp. 39-40, 54.) Sternby never held or supported Bill during the entire investigation because there was no need. (Exh. 1, pp. 54-55.) There was no stumbling, tripping or problems standing alone until after nearly ten minutes had passed, when Bill suddenly fell over at the front of the patrol car without any effort to catch himself. According to Trooper Sternby, as they were walking to the vehicle, "[Bill] seemed to be pretty good. Then as he stepped in front of me, it looked like he just lost his balance and fell to the ground, but up until this portion he seemed to be okay standing still." (Exh. 1, pp. 73-74.)

In sum, this was a standard DUI investigation and Sternby performed his duties respectfully, without game playing, mocking or teasing. Defendant submits that no reasonable fact finder could view this record as supporting a finding of deliberate indifference.

This case is likewise distinguishable from Kneipp, where the Third Circuit found a material issue of fact concerning the element of willful disregard. Indeed, although both cases involve a plaintiff (or plaintiff's decedent in Kneipp) who was highly intoxicated, a fact which the officers in each case suspected or recognized, the similarities end there.

In Kneipp, the husband had been helping his wife walk home from a bar on a cold night. She smelled of urine, staggered and even needed to be carried at times. Kneipp, 95 F.3d at 1201. Here, while Sternby was fairly certain that Bill was too intoxicated to drive safely by the end of the field sobriety tests, he was not greatly concerned about Bill falling because Bill had not shown any indication that he was going to fall during the nearly ten minutes of observation time; moreover, Sternby had made over 200 DUI arrests and had never experienced anyone pass out in this fashion. (Exh. 1, pp. 8, 21-22, 54.) Bill had unsure footing at times, but that was nothing extraordinary in a DUI suspect. (Exh. 1, pp. 39-40, 54.)

What further distinguishes these cases, however, are the very different actions taken by the officers in each case, knowing or suspecting that the plaintiff (or plaintiff's decedent) was highly intoxicated. In Kneipp, the officers allowed the husband to go ahead home, detained the wife, and then sent her home on foot, unescorted, in extremely cold weather. Trooper Sternby, on the other hand, in the course of evaluating Bill's condition and administering proper tests prior to making a DUI arrest, proceeded with FST's, remained standing close to Bill, used a flashlight to show Bill where to stand, and then escorted Bill to the front of the patrol car where he would be close, yet in camera view and away from traffic while Sternby retrieved the PBT from the car's back seat.

**B. The Harm was not Foreseeable of Fairly Direct**

Many of the same facts that preclude a finding of deliberate indifference also establish that the harm to Bill was not foreseeable, as required under element #1 for state-created danger liability.

The harm ultimately caused was not foreseeable except in a global sense, *i.e.*, any intoxicated person may have difficulty walking or standing, the very difficulties which field sobriety tests are designed to reveal. Sternby's intention was to direct Bill to the front of the patrol car, "an area of safety and a place where also he could be easily observed." (Exh. 1, p. 41.) Sternby wanted Bill to wait there while he got the PBT; he showed him where to stand with the flashlight, explained that he was going to retrieve something from the vehicle, and that he would be back in a matter of a few seconds and just wait in this location. (Exh. 1, pp. 43, 47.) Up till that point, Bill had not given Sternby any indications that he was likely to fall, let alone pass out. (Exh. 1, pp. 39-40, 54, 73-73.) According to Sternby, Bill "wasn't wandering around aimlessly. He wasn't just drifting off into – he was staying pretty much stagnant in his locations unless being instructed to move from one location to the other." (Exh. 1, pp. 43-44.)

Indeed, as reflected in the video (Exh. 3), there was no stumbling or inability to stand alone on Bill's part until after nearly ten minutes had passed, when he suddenly fell over at the front of the patrol car without any effort to catch himself. As stated, Sternby had participated in over 200 DUI arrests during the course of his 15-year career as a trooper, yet never had an experience where someone (even with a higher blood alcohol level) simply passed out or fell over without attempting to catch or stop himself. (Exh. 1, pp. 8, 21-22, 54.)

### C. Sternby Did not Create an Opportunity for Harm That Otherwise Did not Exist

Moreover, Sternby did not affirmatively use his authority in a way that created a danger for Bill or rendered Bill more vulnerable to danger than he would have been had Sternby not acted at all. Bright, 443 F.3d at 281; *see also* Brozusky v. Hanover Township, et al, 222 F.Supp.2d 606 (E.D. Pa. 2002) (local government entities not liable for failing to take action to minimize risk of child being struck by school bus); Roberson v. City of Philadelphia, 2001 U.S. Dist. LEXIS 2163 (officers' decision to leave scene to which they were summoned for a disturbance did not create the danger plaintiffs faced; the danger consisted of threats from acquaintances, a situation which existed before police arrived).

When an officer requires a suspected intoxicated driver (even one suspected of being very intoxicated) to exit a vehicle, perform FST's, and even stand at the front of the patrol car in camera view without supporting or holding the individual, there is certainly a risk that the individual may stumble, sway and even fall. But it does not follow that the officer, who is managing a DUI suspect in detention, affirmatively created that risk or the danger of falling. *See* Bright, *supra*.

Here, Bill placed himself in an extremely dangerous position when he got into his truck and attempted to drive while admitted highly intoxicated. He could not be permitted to just "sleep it off" on the side of the road, where he could conceivably suffer from exposure, or potentially wake up and continue driving while in a state of "extreme intoxication." Sternby's decision to have Bill exit the vehicle and submit to proper tests was entirely consistent with procedures for the lawful arrest of one suspected of violating the motor vehicle code, and served to prevent any further infractions of the law and/or injury.

Moreover, it is purely speculative that Sternby's decision to have Bill stand at the front of the patrol car rendered Bill more vulnerable to harm, or that Bill's injuries could have been avoided had Sternby placed him in the car to administer the PBT. Even if Sternby had opted to do so, it would have been all but impossible for Sternby not to step away from Bill for a few moments, simply to move the officers' gear from the back seat. (Exh. 1, p. 44.) After all, Bill passed out without warning, in an instant, while Sternby was just a step or two away.

Thus, the instant case stands in stark contrast to Kneipp, where the Third Circuit found that the officers used their authority to make the wife more vulnerable to danger than she would have been had they not intervened. But for the officers' intervention, the husband would have continued to escort his wife home where she would have been safe. Kneipp, 98 F.3d at 1209. Here, plaintiff cannot seriously suggest that Sternby should not have "intervened." Instead, plaintiff faults Sternby for placing him at the front of the car, not holding onto him, and not putting him in the back seat of the car to administer the PBT. Essentially, plaintiff is challenging Sternby's professional judgment about the management of a suspect in detention – judgments as to whether Bill appeared capable of standing where he was told, whether the PBT was necessary, where and how the PBT should have been administered.[2] At best, Bill's allegations amount to charges of negligence, which cannot support liability under the state-created danger theory.

## II. In the Alternative, Sternby Is Entitled to Qualified Immunity

In the alternative, Defendant Sternby respectfully submits that he is entitled to qualified immunity, a doctrine which generally protects government officials performing discretionary functions from civil damages. *Neuburger v. Thompson, et al*, 124 Fed. Appx. 703, 705, 2005 WL 19275 (3d Cir. 2005). When analyzing the defense of qualified immunity, the court must first determine whether the facts, taken in the light most favorable to the plaintiff, establish a constitutional violation. If so, the court must determine whether the constitutional right at issue was "clearly established" at the time of the alleged violation. Id., *citing* Brosseau v. Haugen, 543 U.S. 194, 201 (2001) and Bennett v. Murphy, 274 F.3d 133, 136-137 (3d Cir. 2002).

[2] Sternby acknowledged that DUI convictions are possible without a PBT. Nonetheless, he is trained to use all available tests. According to Sternby: "I want to use all the tests that I have. I want to make the fairest and most accurate decision based on everything possible before I take someone into custody, place them under arrest." (Exh. 1, pp. 58-59.)

As previously shown, Plaintiff has failed to allege any constitutional violation at all under the Fourteenth Amendment's state-created danger theory because, *inter alia*, Sternby's actions do not establish deliberate indifference or conscious-shocking behavior (nor was the harm foreseeable or the danger affirmatively created by Sternby). Failure to establish a constitutional violation entitles the defendant to qualified immunity without need for further analysis. Wright v. City of Philadelphia, 409 F.3d 595, 601 (3d Cir. 2005).

However, assuming solely for purposes of this summary judgment motion that a factual issue exists regarding conscience-shocking conduct, the Court still should consider whether the constitutional right at issue was clearly established, so that a reasonable officer would have realized that his behavior shocks the conscience under the applicable standard. This precise issue was before the Third Circuit in Marasco II. The Court in Marasco I had ruled that a jury question existed as to the issue of deliberate indifference for liability under the state-created danger theory. In Marasco II, however, the Third Circuit affirmed the District Court's subsequent ruling that the defendants nonetheless were entitled to qualified immunity with respect to the state-created danger claim. Marasco II, 430 F.3d at 156.

According to the Third Circuit in Marasco II, the "salient question" to be asked "is whether the law, as it existed in 1999, gave the troopers 'fair warning' that their actions were unconstitutional. 430 F.3d at 154. Citing to the Third Circuit's decision in Rivas v. City of Passaic, 365 F.3d 181 (3d Cir. 2004), the Marasco II Court recognized that as of November 1998, case law in this Circuit had established the general proposition that state actors . . .

> may not abandon a private citizen in a dangerous situation, provided that the state actors are aware of the risk of serious harm and are partly responsible for creating the opportunity for that harm to happen.

Marasco II, 430 F.3d at 155, *citing* Rivas, 365 F.3d at 200. The Marasco II Court went on to observe, however:

> Yet, we think a reasonable officer could recognize a difference between abandoning a private citizen with whom he had come in contact and failing to prolong a two-hour search for a private citizen whom he has been unable to locate [cite omitted]. At this stage, such a difference is sufficient for the officers to be entitled to qualified immunity.

Marasco II, 430 F.3d at 155.

Thus, while the plaintiffs had produced sufficient evidence to allow a reasonable jury to conclude that the officers' conduct with regard to activating SERT and searching the woods shocked the conscience, the question of whether a reasonable officer would have had "fair warning" that his conduct shocked the conscience "is sufficiently different to warrant the result we reach. The difference may be subtle, but the shocks the conscience standard is somewhat vague, and we are satisfied that fair warning was absent here." Marasco II, 430 F.3d at 156.

Likewise, even if a jury question could conceivably exist as to deliberate indifference here, there was no "fair warning" to Sternby that requiring an individual to attempt standard field sobriety testing, or to stand at the front of a patrol car for a few seconds while a PBT is retrieved from the back seat, could be considered "conscience-shocking" if the officer suspects that the plaintiff's level of intoxication is "high." A reasonable officer simply could not draw a meaningful parallel between the officers' decisions in Kneipp (*i.e.*, sending the intoxicated wife walking home alone, without her husband's assistance, in bitter cold), and an officer's decision to place a suspected DUI driver, who had been standing without significant difficulty for nearly ten minutes, at the front of the patrol car, in camera view, while the officer took several steps away to retrieve a PBT.

Plainly stated, the Third Circuit in Kneipp said nothing about the ongoing management of a suspect in detention. The conduct at issue in that case was the officers' decision to send the intoxicated woman home, on foot, without escort. The Court never suggested that it was wrong to detain the couple and speak with them, or dangerous to allow the wife to lean against the front of the car while talking to the husband, due to her high level of intoxication and the risk of falling. Kneipp, 95 F.3d at 1201. Defendant Sternby submits that nothing in the state of the law with respect to state-created danger as of 2003 would have given him reason to believe that his conduct of the investigation and arrest was anything but proper and reasonable.

For the foregoing reasons, defendant Sternby requests that summary judgment be entered in his favor and against plaintiff.

Respectfully submitted:

**Thomas W. Corbett, Jr.**
Attorney General

By: /s/ Mary Lynch Friedline
Mary Lynch Friedline
Senior Deputy Attorney General
Attorney I.D. No. 47046

Susan J. Forney
Chief Deputy Attorney General

Office of Attorney General
6th Fl., Manor Complex
564 Forbes Avenue
Pittsburgh, PA 15219
Date: May 4, 2006